Supreme Court, U.S.
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No. 00-1860

IN THE

Supreme Court of the United States

MEMORIAL HOSPITALS ASSOCIATION,
Petitioner,

v.

CAROLYN HUMPHREY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

F. CURT KIRSCHNER
DIPANWITA DEB AMAR
O'MELVENY & MYERS LLP
275 Battery Street
San Francisco, CA 94111
(415) 984-8700

WALTER DELLINGER
(*Counsel of Record*)
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Attorneys for Petitioner

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner Memorial Hospitals Association ("MHA") submits this supplemental brief pursuant to Supreme Court Rule 15.8 to comment upon the brief *amicus curiae* filed by the United States in response to this Court's invitation. The government recommends against granting certiorari on either of the two questions presented by the petition. The government's analysis, as we explain here, is flawed in a number of significant respects.

I. THE FIRST QUESTION PRESENTED BY THE PETITION WARRANTS THIS COURT'S REVIEW.

The first question presented by the petition is whether, as the Ninth Circuit held below, an employer's failure to reiterate its offer of a particular accommodation before terminating an employee can be found to violate the ADA's "reasonable accommodation" obligation even if the employer had already offered that exact accommodation and the employee had rejected it. The government contends that: (1) this case is not an appropriate vehicle for addressing the question; (2) there is no conflict in the courts of appeals on the issue; and (3) the result below is correct on the merits. Each of those contentions is without merit.

1. According to the government (*see* Govt. Br. 8-9), this case presents a poor vehicle for addressing the first question presented by the petition. The principal reason, the government submits, is that the basis of the Ninth Circuit's decision below was MHA's failure to participate in cooperative discussions with respondent to "explore" alternative accommodations to the unsuccessful flexible start-time arrangement, not MHA's failure to reiterate its offer of the particular accommodation of a leave-of-absence. It follows, the government asserts, that the case is not an appropriate vehicle for addressing whether an employer can be held liable for failing to reiterate its offer of a particular accommodation – here, a

leave of absence – that was already offered and rejected.

The government's understanding of the Ninth Circuit's opinion is incorrect, and it reflects the very same misconception that underlies respondent's flawed analysis. Contrary to the government's suggestion, the opinion below does not hold that the mere failure to "explore" alternative accommodations with an employee can *itself* violate the ADA's reasonable accommodation requirement. As our reply brief explains, there is no such free-standing duty under the ADA to "explore" accommodations with an employee – or, equivalently, to engage in an "interactive process" with an employee to identify potential accommodations. *See* Pet. Rep. Br. 5-7. The ADA prohibits the failure to *make* a reasonable accommodation, *see* 42 U.S.C. § 12112(b)(5)(A), not the mere failure to *explore* accommodations with an employee even where the employee is unable to identify an available reasonable accommodation that should have been made. Accordingly, the opinion below makes clear that "liability is appropriate" only "if a reasonable accommodation" would "have been possible," and finds that "a leave of absence was a reasonable accommodation for [respondent's] disability." Pet. App. 18a.[1]

The question addressed by the opinion below and squarely presented by this case is whether, given the Ninth Circuit's conclusion that there in fact *was* an available reasonable accommodation (a leave of absence), the employer can be held liable for failing to provide that accommodation even it was already offered and rejected, or whether it instead is incumbent upon the employ*ee* in those circum-

[1] If the government's interpretation of the opinion below is correct – in other words, if the opinion below in fact is best read to hold that MHA's alleged failure to "explore" accommodations with respondent in an interactive dialogue itself violates the ADA's reasonable accommodation requirement – the opinion would squarely conflict with the holdings of several other courts of appeals. *See* Pet. Rep. Br. 7.

stances to request the accommodation before her termination. *See* Pet. App. 18a (identifying the question in the case as the "purely legal one" of whether it was respondent's "burden to make an express request for a leave of absence before she was terminated"). The Ninth Circuit rejected MHA's argument that respondent "is not entitled to a leave of absence because she failed to ask for one before she was fired," holding instead that "MHA was under a continuing duty to offer a reasonable accommodation." Pet. App. 22a. On that basis, the court held "as a matter of law" that "MHA violated the ADA's reasonable accommodation requirement." *Id.* The Ninth Circuit's holding that an employer has a "continuing duty to offer a reasonable accommodation," even if the accommodation was already offered and rejected, warrants this Court's review.

The government suggests (Gov. Br. 9) that the question "has an abstract and hypothetical quality" in this case because "[r]espondent takes issue with [its] basic premise – she denies that petitioner offered her a leave of absence which she then rejected." That argument is without merit. The district court found as a matter of fact that respondent "was initially offered a leave of absence and had rejected it." Pet. App. 45a; *see id.* at 27a ("Plaintiff understood . . . that she had the option of taking some time off, but indicated that she did not wish to take time off"); *id.* at 42a. To be sure, the Ninth Circuit, as the government observes, did not specifically affirm that factual finding. But the Ninth Circuit went even further, holding that the "factual dispute" simply was "not material to [its] ruling," Pet. App. 4a, and *explicitly assuming* in its analysis that the district court's finding was correct, *see* Pet. App. 20a ("assum[ing] that Humphrey turned down the leave of absence"). As a result, the court below held that MHA was under a "continuing duty" to offer a leave of absence to respondent *even assuming* that the accommodation had previously been offered and rejected. This case therefore squarely presents the first question presented

in the petition.

2. The government contends (Gov. Br. 13-15) that there is no conflict on that question between the opinion below and *Hankins v. The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996). That is incorrect. Here, respondent – according to the district court's factual finding and the Ninth Circuit's explicit assumption – had rejected MHA's offer of a leave of absence. In *Hankins*, likewise, the employee had been made "clearly aware" of the availability of "leave time," but had "refus[ed] to accept [the] available reasonable accommodation[]." *Id.* at 801-02. The employee there, like respondent here, asserted that the employer had an obligation to reiterate the availability of leave time before terminating her. *See id.* at 801. But whereas the Ninth Circuit below held that MHA was required to reiterate its offer of a leave of absence before terminating respondent because of an employer's supposed "continuing duty to offer a reasonable accommodation," Pet. App. 21a-22a, the Sixth Circuit in *Hankins* held to the contrary, finding "that an employer has no duty to reiterate self-evident options to an employee when she is clearly already aware of them." *Id.*

The government asserts that the cases are factually distinct, because *Hankins* "dealt with an employee who failed to take advantage of generally available policies." Gov. Br. 15. But in this case, MHA likewise "had a policy of granting leaves to disabled employees," a fact emphasized by the opinions below. Pet. App. 22a; *id.* at 29a. The only difference is that, here, MHA *also* specifically offered a leave of absence to respondent, and respondent specifically rejected that offer.

The government therefore is wrong in suggesting (Gov. Br. 15) that the Sixth Circuit might have decided this case in the same manner as the Ninth Circuit did below. According to the Sixth Circuit, when an employer generally makes leave time available to employees in an employment policy,

the employee is presumed to be "clearly already aware" of the availability of leave time, and it should be "self-evident" to the employee that she can request a leave. 84 F.3d at 801. In those circumstances, the employer has "no duty to reiterate self-evident options to an employee." *Id.* There is no basis for believing that the Sixth Circuit would rule differently where, as here, an employer not only has a general policy of granting leaves of absence, but also specifically offers a leave to an employee – in that situation, the availability of a leave of absence is even more clearly "self-evident," and the employer even more clearly has "no duty to reiterate" the availability of the accommodation prior to termination. For the same reasons, the Ninth Circuit necessarily would decide *Hankins* differently from the Sixth Circuit, based on the "continuing duty to offer a reasonable accommodation" that now governs in the Ninth Circuit. Pet. App. 21a-22a.[2]

3. Finally, the government contends (Gov. Br. 9-12) that the decision below is correct on the merits. That contention should not affect the decision whether to grant certiorari in

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[2] The government suggests (Gov. Br. 13) that the conflict does not involve an issue of recurring importance. But the only reason there have been few cases on the question is that, until the Ninth Circuit's decision below, no one supposed that an employer was required to continually reiterate the availability of an accommodation (for an unspecified number of times) even after an employee has specifically been offered and has rejected the accommodation. Instead, the law generally recognized the common sense assumption that, where an employee has rejected a proposed accommodation, the employee cannot then bring an action alleging that the employer violated the ADA by failing to provide that accommodation. *See Hankins, supra*; Pet. App. 45a (district court concluding below that plaintiff cannot prevail where she "was initially offered a leave of absence and rejected it, and then failed to request a leave of absence subsequently"). The Ninth Circuit's contrary decision below has profound implications for employers, who must now engage in the exercise of attempting to ascertain how many times they must reiterate the availability of a particular accommodation to satisfy their newly-minted "continuing duty to offer a reasonable accommodation." Pet. App. 21a-22a.

view of the conflict between the Ninth and Sixth Circuits and the importance of the issue to employers. But the government's analysis of the merits is incorrect in any event. In the government's view (Gov. Br. 11), an employer cannot be held liable for failing to make a reasonable accommodation that was offered and "categorically" rejected, but an employer can be held liable where the employee's rejection of the accommodation is only "constructive" in the sense that the employee prefers a different accommodation.

Even if there were any basis for such an elusive distinction in the ADA, the government's rationale misses the point. Our argument is not, as the government apparently believes, that an employer is permanently insulated from liability for failing to provide a particular reasonable accommodation if the employee initially rejects the accommodation. Our argument instead is that, once an employee has been made aware of the availability of a particular accommodation and has rejected it – whether "categorically" or "constructively" – the employer is not required continually to remind the employee of the accommodation's availability. Instead, the employee must inform the employer that she wishes to take advantage of the available accommodation. The employee cannot file suit based on the employer's failure to provide the accommodation given that the employee was made aware of its availability, rejected it initially, and failed subsequently to inform the employer that she was interested in taking advantage of its availability. That was the conclusion of the Sixth Circuit in *Hankins*, and it is the only sensible reading of the statute. If it were otherwise, an employer, having already made an accommodation available to an employee, would be required to guess whether it must remind the employee of the accommodation's availability an indefinite number of times or else face the prospect of liability for having failed to provide the accommodation.

II. THE SECOND QUESTION PRESENTED BY THE PETITION WARRANTS THIS COURT'S REVIEW.

The second question presented by the petition is whether a leave of absence is a reasonable accommodation even without any showing of the length of leave necessary to enable the employee to perform her job or any showing of whether a leave is likely to enable her to perform her job. The government's arguments against granting review of that question are unpersuasive.

1. First, with respect to the Ninth Circuit's holding that a a leave of absence is a reasonable accommodation as a matter of law without requiring any evidence concerning the necessary length of the leave, the government contends that the question is not presented by the facts of this case. According to the government, MHA's "failure to respond to respondent's request to work at home with a specific leave of absence proposal pretermitted any negotiation over what length the leave would be." Govt. Br. 18. That argument misses the point.

As the government acknowledges, Dr. Jacasin's letter – the sole evidence in the record concerning the prospect of a leave of absence – said only that respondent "may" benefit from "some time off." That language was the entire basis for the Ninth Circuit's conclusion that a leave of absence was a reasonable accommodation *as a matter of law*. *See* Pet. 22a ("Accordingly, we hold as a matter of law . . . that MHA violated the ADA's reasonable accommodation requirement"). The Ninth Circuit did not remand for further findings to assess the duration of leave that would have been necessary to enable respondent to return to work. The Ninth Circuit's holding that a leave of absence is a reasonable accommodation as a matter of law – even in the absence of any evidence concerning the length of leave necessary to address the disability – conflicts with decisions of the First, Second, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits,

all of which have held that a leave of absence, in order to be reasonable, must be finite in duration. *See* Pet. 21.

2. The other aspect of the second question raised by the petition concerns the Ninth Circuit's holding that a leave of absence is reasonable as long as it could "plausibly" enable an employee to perform the essential functions of her job. Pet. App. 15a-16a. The government concedes (Gov. Br. 18) that the Ninth Circuit's holding on that issue conflicts directly with the Eleventh Circuit's decision in *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222 (11th Cir. 1997). But the acknowledged circuit split is not suitable for this Court's review, the government asserts, because the opinion below is at odds with an earlier decision of the Ninth Circuit itself, *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169 (1998) (per curiam), and this Court should await resolution of the purported intra-circuit conflict.

Contrary to the government's assertion, *Mustafa* does not conflict with the decision below. Govt. Br. 19. To begin with, in *Mustafa* – unlike in this case – there was no dispute concerning the plaintiff's burden of proof in establishing that a particular accommodation would have been effective, and the court did not select one standard over another. Instead, the statement relied on by the government was strictly in the nature of a perfunctory recitation of general standards as background information.[3] In the opinion below, by contrast, the Ninth Circuit was directly confronted with competing burdens of proof, and the court specifically rejected a standard requiring a showing that a leave of absence would "likely" have enabled performance of the job in favor of a lesser standard only requiring a showing that a leave "could have plausibly" enabled performance of the job. Pet. App. 15a. Because the opinion below specifically addresses and

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[3] Indeed, no subsequent decision of any court relies on *Mustafa*'s statement concerning the burden of proof.

resolves the issue, there can be no question that its considered holding, not the passing discussion in *Mustafa*, is the controlling standard in the Ninth Circuit on whether a leave of absence is a reasonable accommodation.

That is especially so because the accommodation at issue in *Mustafa* was not even a leave of absence, but instead was a reassignment to a different position. *See* 157 F.3d at 1176. *Mustafa*'s generalized statement therefore sheds no light on the specific question of whether a plaintiff attempting to demonstrate that a leave of absence is a resasonable accommodation must establish that a leave "likely would have" enabled her to return to work, or whether she need only establish that a leave "plausibly could have" enabled her to return to work. That issue is controlled by the decision below, not *Mustafa*.

Finally, and perhaps most importantly, *Mustafa* does not involve a claim asserted under the ADA, but instead involves a claim brought under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. While the government suggests that the distinction is immaterial (Gov. Br. 19), the ADA makes clear that the Rehabilitation Act only constitutes a floor of protection for employees. *See* 42 U.S.C. § 12201(a) ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under [the Rehabilitation Act] or the regulations issued by Federal agencies pursuant to [the Rehabilitation Act]."). Because the Ninth Circuit can, consistent with the ADA, adopt a standard more favorable to employees than a comparable standard under the Rehabilitation Act, there is no intra-circuit conflict between the ADA standard adopted by the opinion below and the more restrictive Rehabilitation Act standard described in *Mustafa*. The acknowledged circuit conflict between the opinion below and the Eleventh Circuit's decision in *Duckett* therefore warrants this Court's review.

III. THIS COURT'S REVIEW OF THE QUESTIONS PRESENTED BY THE PETITION WOULD NOT BE PREMATURE.

The government contends (Gov. Br. 19-20) that review is not warranted in this case because it is an interlocutory posture. According to the government, further factual development is necessary "on such matters as whether petitioner initially offered respondent a leave of absence, the necessary duration of respondent's leave, and the likelihood that respondent would have been able to perform the job upon her return." Gov. Br. 20. But the Ninth Circuit's opinion forecloses further factual development on any of those issues, holding that a leave of absence is a reasonable accommodation as a matter of law. That issue is now decided, and the only sense in which the case is in an "interlocutory" posture is that the district court must assess on remand whether respondent is disabled. *See* Pet. App. 10a-13a. This Court has previously granted review of questions concerning the proper interpretation of the ADA's reasonable accommodation standard in precisely analogous circumstances. *See US Airways, Inc. v. Barnett*, No. 00-1250 (certiorari granted on reasonable accommodation question even though there remains an unresolved issue of fact concerning whether plaintiff is disabled under the ADA).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

F. CURT KIRSCHNER
DIPANWITA DEB AMAR
O'MELVENY & MYERS LLP
275 Battery Street
San Francisco, CA 94111
(415) 984-8700

WALTER DELLINGER
(*Counsel of Record*)
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Attorneys for Petitioner